89-516

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILBERT LEE EVANS,
Petitioner,

v.

CHARLES THOMPSON, Superintendent,
Mecklenburg Correctional Center,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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September 27, 1989

QUESTIONS PRESENTED

1. When a defendant has been sentenced to death under a state statute which automatically mandates a sentence of life imprisonment if the death sentence is later set aside because of constitutional error, and the sentence is later set aside for that reason, does it violate the *ex post facto* clause of the United States Constitution to resentence the defendant to death under a statute, enacted long after the defendant's initial sentence had become final, which permits capital resentencing.

2. When a defendant has been sentenced to death under a state statute which automatically mandates a sentence of life imprisonment if the death sentence is later set aside because of constitutional error, and the sentence is later set aside for that reason, does it violate the equal protection clause of the United States Constitution to resentence the defendant to death under a new statute which permits capital resentencing, when other similarly situated defendants tried under the earlier law received the mandatory sentence of life imprisonment.

3. When a state has secured a death sentence through the knowing use of false evidence, at a time when state law mandated a sentence of life imprisonment for any defendant whose death sentence was later determined to be unconstitutional, does it violate the defendant's federal right to the due process of law if the state fails for two years to disclose the known misconduct, and then seeks to resentence the defendant under a newly enacted statute which (unlike the prior law) authorizes capital resentencing.

4. When the trial record in a capital case plainly indicates that the defendant has been sentenced to death on the basis of false evidence, does it violate the defendant's federal rights to effective assistance of counsel and the due process of law if his counsel fails to discover or as-

sert those errors during the course of the defendant's direct appeal, at a time when, but for counsel's failure, the defendant's sentence would automatically have been commuted to life imprisonment.

5. When a capital sentencing jury asks the court during deliberations if a split decision will automatically result in the imposition of a sentence of life imprisonment, and the answer to that question plainly is yes, does it violate the defendant's federal right to the due process of law when the court refuses to answer the jurors' question, but instead instructs them that they must reach a unanimous verdict.

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Wilbert Lee Evans ("Evans") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

In this capital case, the United States Court of Appeals dismissed Evans' first (and only) federal habeas corpus petition, affirming the judgment of the federal district court. The opinions of the court of appeals (hereafter, the "lower court," "circuit court," or "Fourth Circuit") and the district court, which are unreported, are set forth in the Appendix ("App.") at 2a, and 17a, respectively.

JURISDICTION

The judgment of the court below was entered on August 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth separately at the end of this volume.

STATEMENT OF THE CASE

In this capital case the Commonwealth's pervasive, gross, and admitted misconduct has so far successfully deprived Evans of the sentence of life imprisonment to which he would otherwise be entitled. As we show below, Evans was sentenced to death in April 1981 on the basis of evidence that the Commonwealth later admitted was known to be false. For 23 months thereafter, the Commonwealth stonewalled, citing the false evidence in pleadings filed in four courts (including this Court), while falsely denying for a full year Evans' explicit, repeated attacks upon that evidence. Throughout this entire period, the Virginia Attorney General's office was lobbying the state legislature to enact emergency legislation permitting for the first time resentencing in capital proceedings. *On the very day that legislation was adopted* (twenty-three months after Evans' trial), the Commonwealth confessed what it had known all along—that Evans' death sentence rested on false and unconstitutional evidence.

This case presents several novel and important questions concerning whether a state which obtained a death sentence through the knowing use of false evidence, at a time when state law prohibited capital resentencing, may subject the defendant to resentencing under a new law enacted years after the defendant's first sentence had become final. (*See* Points I-III, below). This case also presents the important question, on which the lower courts have divided, of whether a capital sentencing jury should be told, in response to their specific inquiry during deliberations, that a split decision will automatically

result in a sentence of life imprisonment. (Point IV, below).

All of the facts material to Evans' claims are undisputed: they come straight from contemporaneous documents, court filings, and the sworn admissions of two Commonwealth prosecutors. Because so few of the material facts are even mentioned in the opinions below, they are set forth at length here.

1981 Conviction and Sentencing

Wilbert Evans was convicted of capital murder in April 1981, for the January 1981 shooting of an Alexandria, Virginia Deputy Sheriff.[1] At the sentencing phase of Evans' bifurcated trial, the Commonwealth's evidence consisted almost exclusively of three Exhibits (Commonwealth Exhibits 19-21) that purported to depict Evans' prior conviction record. The Exhibits showed seven separate prior convictions, for offenses in North Carolina, the state of Evans' birth. They included a conviction for "[a]ssaulting a police officer with a knife while the officer was in the performance of his duties" (App. 87a)—an offense strikingly similar to the one for which Evans had just been convicted.

Evans' court-appointed counsel, Long and Brown, raised several technical objections to the Exhibits, but did not attack their underlying validity. Out of the presence of the jury, the court reviewed each of the Exhibits, page-by-page, asking Commonwealth prosecutor John Kloch whether each of the offenses shown was in fact a conviction, and whether the convictions were for felonies or misdemeanors. (App. 31a-40a). The prosecutor said

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[1] The shooting occurred as Evans was being returned to jail after a court appearance and as he struggled with the deputy in an attempt to escape. Evans was captured less than one hour after the shooting. From the outset Evans admitted responsibility for the shooting. However, Evans has always contended, and still contends, that he never intended to kill the deputy, but that the gun fired accidentally as he and the deputy struggled to control it.

nothing to indicate that there were any flaws in the Exhibits, which were then admitted into evidence. (App. 31a-40a).

In closing argument, prosecutor Kloch repeatedly referred to Evans' prior conviction records as shown in the Exhibits, and twice referred to the offense of assaulting a police officer with a knife. (App. 41a). On April 17, 1981, the jury recommended the death penalty on the basis of the statutory aggravating factor of "future dangerousness," [2] and was discharged.

Sentencing and Appeal

On June 1, 1981, the trial court held a hearing for the imposition of sentence. At the outset the court reviewed and received into evidence a "post-sentence report" dated May 12, 1981, prepared by the Commonwealth's Probation Department. (App. 42a-45a). In a section listing Evans' prior conviction record, the report showed that the most serious conviction depicted in Commonwealth Exhibit 21 —"Assault on Officer/Affray with a Deadly Weapon"— was not a valid conviction, but had been *nolle prossed.* (App. 43a). Defense counsel told the court that they had read the report (App. 47a); but they raised no question about the contradiction between the report's account of Evans' prior record and the Commonwealth Exhibits that had been admitted into evidence at the April trial. After expressly including the report in the trial record (App. 48a-49a), the trial judge sentenced Evans to death. (App. 49a).

Long and Brown continued to represent Evans throughout his direct appeal, from June 1981 through March 1982. During that period counsel raised no objection to any of the seven prior convictions depicted in Common-

[2] The jury found that there was a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society. . . ." Va. Code § 19.2-264.2(1) (1983).

wealth Exhibits 19-21—even though the Commonwealth's Brief to the Virginia Supreme Court explicitly recited each of those convictions (App. 50a-53a), and even though the Virginia Supreme Court explicitly discussed their significance in a published opinion affirming Evans' conviction and death sentence. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816, 820, 823 (Dec. 4, 1981), *cert. denied*, 455 U.S. 1038 (1982) (*"Evans I"*). Likewise, counsel raised no challenge when the Commonwealth, in opposing Evans' certiorari petition, filed a brief which explicitly recited the seven prior convictions. (App. 54a-57a). This Court denied certiorari on March 22, 1982.

The Commonwealth's Confession of Error

Days before his scheduled execution, Evans obtained new counsel ("habeas counsel"), who discovered almost immediately that Evans' death sentence rested on false and unconstitutional evidence. Represented by his new counsel, Evans filed in April 1982 a petition for a writ of habeas corpus in the Circuit Court of Alexandria, Virginia. From April 1982, through January 1983, Evans filed four separate pleadings [3] in that court that attacked explicitly and in exacting detail the validity of the seven prior "conviction" records presented at Evans' April 1981 sentencing. Specifically, Evans asserted that there was no valid conviction for assaulting a police officer; that three of the supposed convictions were duplicative of each other; and that the others were inadmissible, because they had been obtained while Evans was without benefit of counsel. (App. 58a-74a). For a full year the Commonwealth resisted these petitions, filing pleadings in the state habeas court on July 23, 1982, and March 3, 1983, that denied each of Evans' factual allegations. (App.

[3] These included Evans' Petition for Habeas Corpus (filed April 9, 1982) (App. 58a-61a), Amended Petition for Habeas Corpus (May 5, 1982) (App. 62a-65a), Bill of Particulars (July 6, 1982) (App. 67a-70a), and Second Amended Petition (December 22, 1982) (App. 72a-74a).

83a-86a). The Commonwealth's denials were signed by Assistant Attorney General Jerry P. Slonaker.

As discussed below, these denials had a devastating impact on Evans' case because, at the time they were made, Virginia law prohibited capital resentencing. As the court below correctly noted, "[p]rior to [March 28, 1983], if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment." (App. 5a). That point was settled at least as early as October 1981, when the Virginia Supreme Court authoritatively construed the state's capital sentencing statute in *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (Oct. 16, 1981)—a decision issued by the same court that decided Evans' direct appeal six weeks later.[4]

During the entire year that Evans' state habeas petition was pending, representatives of the Virginia Attorney General, including Assistant Attorney General Slonaker, lobbied the Virginia legislature to overrule *Patterson* and allow capital resentencing. On March 28, 1983, Virginia adopted the amendment proposed by the Attorney General, which, effective immediately, permitted capital resentencing. *On that same day* Slonaker informed Evans' counsel that the Commonwealth intended to confess error in the Evans case. The Commonwealth's written confession of error, dated April 12, 1983, ad-

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[4] The *Patterson* decision was based on Virginia's then-existing capital sentencing statute, under which only the same jury that found a capital defendant guilty could fix his punishment. Because the jury in *Patterson* had been tainted by constitutional error, it could not be reconvened to resentence the defendant. And because Virginia had no statute authorizing resentencing before a different jury, the Virginia Supreme Court concluded that Patterson's death sentence had to be reduced automatically to life imprisonment. 283 S.E.2d at 216. *See also Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 117 (1984), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*).

mitted to each of the errors that Evans had begun alleging a year earlier: that three of the seven convictions were duplicative; that there was no valid conviction for assaulting a police officer; and that the other convictions were uncounselled. The written confession asserted, however, that these errors were made "unbeknownst to the prosecution." (App. 88a). Subsequent events proved that assertion false.

By order dated May 2, 1983, the court vacated Evans' death sentence. Thereafter, the Commonwealth sought resentencing under Virginia's newly amended capital sentencing statute. When Evans objected, the state trial court held an evidentiary hearing, in September 1983, to determine whether resentencing was permissible.

At the hearing, two Commonwealth prosecutors admitted under oath to a series of actions that for two years effectively deceived four courts (including this Court) about the true facts surrounding Evans' first death sentence. Far from claiming ignorance of the errors in the prior conviction records (as the Commonwealth's confession of error had suggested), the trial prosecutor (Kloch) admitted that he had known as early as February 1981—two months *before the trial*—that three of the seven convictions were duplicative, and that there was no valid "conviction" for assault on a police officer. (App. 92a-95a). Kloch's sworn admissions were corroborated by a written report, prepared by Kloch's assistant and given to Kloch in February 1981, which plainly identified the errors in Evans' supposed conviction records. (App. 29a-30a). In defending his conduct at trial, Kloch claimed that in an off-the-record discussion—held after the bench conference with the judge and after the tainted evidence had gone to the jury, but before final arguments—Kloch told defense counsel about the errors, but that counsel had failed to object.[5] Kloch had no ex-

[5] (App. 95a-96a, 100a-103a). Kloch claimed that he believed defense counsel had some "tactical" reason for failing to object. Even if this testimony were plausible, it is irrelevant. By Kloch's

planation, however, for his decision to proffer the false conviction records in the first place, or for his failure to inform either the trial court or jury about the known errors. (App. 96a, 100a).

Although Kloch's office did not represent the Commonwealth in the direct appeal, Kloch testified that he had read an "advance sheet" copy of the Virginia Supreme Court's December 1981 opinion—which explicitly recited and relied on the seven supposed convictions, with particular emphasis on the one concerning a police officer. *See Evans I*, 284 S.E.2d at 820, 823. By his own admission, Kloch did nothing to correct the court's unwitting reliance on that false evidence. (App. 97a-98a).

Slonaker was the other key witness at the September 1983 hearing. Although he denied making any conscious effort to delay the confession of error to achieve a tactical advantage, he made several crucial admissions that are nowhere discussed in the opinion below. First, Slonaker admitted that on or before January 1983, he and Kloch had met to discuss Evans' case. At that meeting, Kloch told Slonaker that Evans' death sentence had been obtained by the knowing use of false evidence.[6]

Second, Slonaker acknowledged that in January 1983—two months before the law was amended, and three months before the confession of error—he had received letters directly from the clerk of the court in North Carolina confirming that the "conviction" records proffered by the Commonwealth at the 1981 trial were false and misleading. (App. 77a-82a, 117a). It is undisputed

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own account, his supposed disclosure to defense counsel occurred *after* the tainted Exhibits had gone to the jury and thus, after the damage had been done. (App. 100a-103a). In any event, both of Evans' defense counsel denied under oath that Kloch had ever made such a disclosure (App. 103a-110a), and no court has ever resolved that disputed issue of fact. *See Evans II*, 323 S.E.2d at 120.

[6] Both Slonaker and Kloch testified about this meeting. (App. 115a-117a (Slonaker), 98a-99a (Kloch)).

that six weeks after receiving these letters, and after his face-to-face meeting with Kloch, Slonaker filed an Amended Answer in the state habeas court again denying the allegations in Evans' state habeas petitions—allegations which by that point Slonaker knew were true. (App. 83a-86a).

Finally, Slonaker admitted that throughout this same period—while Evans was pressing his appeal and state habeas petition, and Slonaker was receiving reports that Evans' allegations were accurate—Slonaker had been actively involved in lobbying the Virginia legislature to adopt emergency legislation permitting capital resentencing. By his own admission, Slonaker had written a memorandum in September 1982 urging adoption of the measure (App. 113a); helped draft and revise the actual language of the proposed amendment (App. 113a); and appeared twice before legislative committees in support of it, in January and February 1983. (App. 113a-114a).

At the close of the September 1983 hearing, Judge Wright ruled from the bench, permitting resentencing under the amended statute. (App. 117a). That ruling was followed by a terse order, which the court below characterized as "findings of fact." (App. 118a-120a).

1984 Resentencing

A resentencing hearing was held on January 31-February 3, 1984. During the course of its deliberations, the resentencing jury asked the court whether "a split decision automatically become[s] life." (App. 122a). As described below, over defense counsel's objection, the court responded in a way that deliberately left the question unanswered. *See* pp. 26-27, *infra*. The jury then recommended the death sentence, based on the statutory aggravating factor of "future dangerousness."[7] On March

[7] Four months later Evans was involved in an event that is flatly inconsistent with any finding that he poses a "future danger" to society or deserves the death penalty. In May 1984, six death row inmates escaped from Mecklenburg Correctional Center (where

7, 1984, the court imposed sentence of death. The Supreme Court of Virginia affirmed, and this Court denied certiorari. *Evans II*.[8]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SCOPE OF *DOBBERT v. FLORIDA*, WHICH THE FOURTH CIRCUIT MISCONSTRUED TO REACH AN UNPRECEDENTED RESULT.

The circuit court's entire justification for rejecting Evans' *ex post facto* and equal protection claims was a mistaken construction of this Court's decision in *Dobbert v. Florida*, 432 U.S. 282 (1977). Although *Dobbert* arose out of peculiar factual circumstances that have seldom if ever been repeated, the lower courts have struggled for more than a decade to apply *Dobbert*'s principles to a wide array of other circumstances. The result has been a series of confusing and inconsistent decisions in both federal and state courts.[9] No case more plainly illustrates

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Evans was incarcerated), after holding fourteen prison guards hostage. Despite extreme pressure to join the escape, or simply to yield to events, Evans prevented violence and helped those who had been taken hostage. Though unarmed, he placed himself between the heavily armed escapees and the hostages, intervening on the hostages' behalf, urging the escapees to remain calm and nonviolent, and helping the hostages when he could. The fourteen hostages credit Evans with saving their lives, and one female hostage credits him with preventing her rape. (App. 124a-129a).

[8] Thereafter, Evans exhausted the remaining claims in his state habeas petition; the Virginia Supreme Court denied review of those claims in a two-sentence order, *Evans v. Bair*, No. 860831 (Feb. 26, 1987), and this Court denied certiorari. 483 U.S. 1010 (1987).

[9] The decision below squarely conflicts with the result, if not the reasoning, of another federal circuit on the same issue. *See Coleman v. McCormick*, 874 F.2d 1280, 1286 & n.7 (9th Cir. 1989) (en banc) (distinguishing *Dobbert*; due process violated by retroactive application of new capital sentencing statute to defendant whose sentence under earlier statute had been set aside as unconstitutional). *But cf. Coleman v. Saffle*, 869 F.2d 1377, 1385-87

that confusion than this one, or more clearly demonstrates the need for this Court to revisit and clarify the law of *ex post facto*. Until this case, no federal court had extended *Dobbert* to authorize the retroactive application of a statute enacted years after the defendant's crime, sentencing, and direct appeal had become final, and thereby retroactively deprive him of a complete statutory defense to a capital sentencing. Under the banner of encouraging state legislatures to reform their criminal laws (*see* App. 8a), the lower court made a wholesale revision of the *ex post facto* and equal protection clauses, which plainly misconstrues *Dobbert* and ignores other applicable authority.

(10th Cir. 1989) (due process not violated by retroactive application of new capital sentencing principles governing weighing of aggravating and mitigating factors; due process analysis should be identical to *ex post facto* analysis in *Dobbert*). The state courts have cited *Dobbert* as both prohibiting retroactive application of new sentencing statutes, and as authorizing it. *Compare Thigpen v. Thigpen*, 541 So. 2d 465, 467 (Ala. 1989) (resentencing under new capital statute violates *ex post facto; Dobbert* distinguished), *State v. Rodgers*, 242 S.E.2d 215, 217-18 (S.C. 1978) (distinguishing *Dobbert*; resentencing even under ameliorative statute barred, where defendant had already been tried and convicted under earlier law), and *Meller v. State*, 581 P.2d 3, 4 n.3 (Nev. 1978) (per curiam) (same); *with Klasing v. State*, 771 S.W.2d 684, 686-87 (Tex. Ct. App. 1989) (no *ex post facto* violation from retroactive application of new law permitting resentencing) and *State v. Norton*, 675 P.2d 577, 585-88 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) (same). Even within the same jurisdiction, there has been repeated, sharp disagreement over the proper construction of *Dobbert*. *Compare Dutton v. Dixon*, 757 P.2d 376, 380 (Okla. Crim. App. 1988) (distinguishing *Dobbert; ex post facto* clause prohibits resentencing) *with Cartwright v. State*, 1989 Okla. Crim. App. LEXIS 45 (July 31, 1989) (citing *Dobbert* as basis for overruling *Dutton v. Dixon*). *Compare State v. Creekpaum*, 732 P.2d 557, 561-68 (Alaska App. 1987) (distinguishing *Dobbert; ex post facto* clause violated by retroactive extension of statute of limitations before prosecution had become time-barred) *with State v. Creekpaum*, 753 P.2d 1139, 1141-42 (Alaska 1988) (taking contrary view of *Dobbert* and reversing lower court).

A. Resentencing Evans to Death Under Virginia's Amended Capital Statute Violated the *Ex Post Facto* Clause.

As the court below explicitly conceded, "[p]rior to th[e] amendment [of March 28, 1983], if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment." (App. 5a). The only death sentence that the Commonwealth secured against Evans prior to March 1983 was, by the Commonwealth's own admission, unconstitutional and could not "be sustained." (App. 87a). Thus, as the lower court's opinion explicitly recognizes, if Evans' death sentence had been vacated at any time prior to March 1983, he would have been entitled to an automatic sentence of life imprisonment, and could have successfully asserted an absolute defense against any effort by the state to resentence him to death. The issue presented here is whether Virginia violated the *ex post facto* clause when it retroactively applied its amended capital sentencing statute—enacted more than two years after the offense, and a full year after Evans' appeal was final—to deprive Evans of the automatic sentence of life imprisonment provided by the earlier law.

The lower court's effort to squeeze this case into the *Dobbert* mold ignores *Dobbert*'s facts, holding, and express language. The facts in *Dobbert* bear no resemblance to the ones here. The defendant in *Dobbert* committed his offense at a time when Florida had in place a capital sentencing statute which was manifestly unconstitutional, because it provided an automatic presumption in favor of death unless a majority of the sentencing jury recommended mercy. By the time of Dobbert's trial, Florida had replaced its unconstitutional sentencing statute with a new statute that provided the defendant with a full panoply of procedural rights. Dobbert was tried and sentenced to death under the new, ameliorative, constitutional sentencing statute. His *ex post facto* chal-

lenge to that sentence stood both the law and common sense on its head: though sentenced to death under the constitutional law, he claimed that the result would have been different had he been tried under its unconstitutional and draconian predecessor. In rejecting that claim, the Court did no more than recognize that a defendant has no constitutional right to be sentenced under an unconstitutional statute. Moreover, since Dobbert had never been tried under the old statute, his prediction about how the jury might have voted if that law had been in place was rank "speculation." 432 U.S. at 294.

Evans' case is manifestly distinguishable from *Dobbert* in ways that the lower court did not address. Evans was tried under a law that is conceded to be constitutional; that was in place at every phase of his criminal proceeding, from indictment through direct appeal and beyond; and that plainly prohibited resentencing if the Commonwealth committed error, as indeed it did. Moreover, Virginia's new statute, unlike the one in *Dobbert*, was anything but ameliorative, as the district court recognized. (App. 20a (n.1)). Its sole purpose was to provide the state additional, repetitive opportunities, foreclosed under the earlier law, to secure death sentences against capital defendants.

Ignoring these factual distinctions, the lower court claims that in this case, as in *Dobbert*, "*ex post facto* concerns were satisfied because the applicable statute when [the defendant] committed murder warned him of the penalty . . . prescribed for first-degree murder." (App. 6a). Once that warning had been given, the court asserts, the state had free rein to make any retroactive changes it wished, as long as they did not increase the quantum of punishment or change the proof necessary to convict. (App. 6a-8a). Though supposedly based on *Dobbert*, these conclusions go far beyond the narrow facts of that case and virtually read the *ex post facto* clause out of existence —particularly for capital crimes where, by definition, the state can do nothing to increase the quantum of punishment.

The lower court's construction of *Dobbert* also unnecessarily pits that case against numerous decisions of this and other courts which have struck down as *ex post facto* laws that neither increased the quantum of punishment associated with the offense, nor altered any of the statutory elements of proof.[10] These include laws retroactively reducing the size of the petit jury in criminal cases;[11] permitting criminal proceedings to commence by information, rather than indictment;[12] and altering the standard for the admission of impeachment evidence in criminal trials.[13] Moreover, in a particularly relevant line of cases dealing with extensions of statutes of limitation for criminal offenses, courts have uniformly recog-

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[10] The circuit court's construction of *Dobbert* is plainly at odds with this Court's decision in *Kring v. Missouri*, 107 U.S. 221 (1883). The circuit court is inexplicably mistaken in suggesting that Kring's case can be distinguished from Evans' because Kring was "on notice" at the time of the offense that "he [could] never be subjected to a death sentence . . . ." (App. 7a). To the contrary, Kring had been charged from the outset with capital murder, and indeed, had earlier been sentenced to hang. 107 U.S. at 221-22, 236. When that sentence was set aside, Kring pled guilty to a lesser offense; and when the plea was set aside, the State sought to amend its law to strip Kring of his absolute defense to another capital sentencing. *Id.* at 229, 234. This Court held that Missouri's effort retroactively to abrogate Kring's defense violated the *ex post facto* clause, just as it does here.

Unlike the circuit court, the district court correctly recognized that respondent's construction of *Dobbert* cannot be reconciled with *Kring*. The district court's solution, however, was to declare that *Kring* had been "modified or overruled" by *Dobbert*. (App. 22a (n.4)). That is plainly wrong: this Court cited *Kring* with approval in a case decided four years *after Dobbert*. *See Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981).

[11] *Thompson v. Utah*, 170 U.S. 343, 355 (1898). *See United States v. Juvenile Male*, 819 F.2d 468, 471 (4th Cir. 1987) (citing *Thompson* with approval).

[12] *Mafnas v. Government of Guam*, 228 F.2d 283, 285-86 (9th Cir. 1955).

[13] *United States v. Henson*, 486 F.2d 1292, 1308 (D.C. Cir. 1973) (en banc).

nized that once a statutory period has lapsed, the state may not prosecute a potential defendant for the offense under a new, longer statutory period.[14] In those cases, like this one, the state has sought not to change the elements of the crime or increase the quantum of punishment associated with it, but rather to enlarge the class of potential defendants to include those for whom prosecution would otherwise be time-barred. The cases stand for the precise proposition at issue here: a state violates the federal *ex post facto* clause when it retroactively seeks to strip from the defendant a complete statutory defense to the crime (or in this case, the resentencing). The lower court's unprecedented construction of the *ex post facto* clause casts doubt on the continued validity of these cases and adds significantly to the confusion in this already difficult area of the law. This Court should grant certiorari to clarify and resolve the uncertainty created by the lower court's opinion.

B. Resentencing Evans to Death Under Virginia's Amended Capital Statute Violated the Equal Protection Clause.

Because "death is different," this Court has long insisted that the procedures used to impose it produce reliable results, and that the state courts "ensure that

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[14] That principle was articulated by Judge Learned Hand in *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928), in which the court permitted prosecution under the amended statute because it had been adopted *before* the initial statutory period had expired. *Accord United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Clements v. United States*, 266 F.2d 397, 399 & n.4 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); *United States v. Fraidin*, 63 F. Supp. 271, 279 (D. Md. 1945). However, once a defense to prosecution exists because the statutory period has lapsed, the state may not prosecute the potential defendant for the offense under a new, longer statutory period. *See, e.g., Sobiek v. Superior Court*, 28 Cal. App. 3d 846, 106 Cal. Rptr. 516, 518 (1972); *State v. Edwards*, 701 P.2d 508 (Wash. 1985) (en banc). Although those cases were extensively discussed in the briefs below, the circuit court did not mention them.

similar results are reached in similar cases." [15] Precisely the opposite happened here: two strikingly similar cases produced dramatically different results. Although Patterson and Evans both received flawed death sentences under the same law in 1981, and their cases moved virtually in tandem through the Virginia courts, the results could not have been more different: Patterson was sentenced to an automatic term of life, while Evans was forced to face the renewed prospect of death. *See* note 4, *supra*. The sole reason for this disparate result was one illegitimate circumstance: each of the four courts (including this Court) that reviewed Evans' case in the two years after his trial was materially misled by the Commonwealth's failure to disclose that Evans' death sentence rested on false and unconstitutional evidence. Although the prosecution knew of the false evidence from the moment it was offered, and Evans squarely challenged that evidence in the state habeas proceeding a full year before Virginia's capital sentencing amendment was adopted, the courts were denied the truth about Evans' sentence until the new amendment was in place. No rational or legitimate purpose is served by a legislative classification that distinguishes two otherwise identical cases solely on that basis.

The lower court's cryptic rejection of Evans' equal protection claim is premised, once again, on a misreading of *Dobbert*. Contrary to the Fourth Circuit's claim (App. 9a), the line-drawing authorized by *Dobbert* provides no justification for what occurred here. In *Dobbert*, the Court upheld a death sentence obtained under a constitutional penalty statute enacted after commission of the crime *but before trial*. Although permitting the line to be drawn at that point because "the new statute . . . was in effect at the time of [Dobbert's] trial" and sentencing, 432 U.S. at 301, the Court stated: "Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process

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[15] *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (citation omitted).

as to be governed solely by the old statute . . . and those whose cases involved acts which could properly subject them to punishment under the new statute." *Id.*

Here, by contrast, Virginia did not apply the law in effect at the time of Evans' trial and sentence, or even in effect at the time of Evans' direct appeal and state habeas petition. Rather, it applied a law passed two years *after* Evans' trial, and more than a year after his death sentence had become final. By that time, Evans' case had not only "progressed sufficiently far in the legal process as to be governed solely by the old statute," *id.*, it could not possibly have progressed any farther. Pushing *Dobbert*'s line to that point makes any line-drawing irrational and meaningless; a line drawn there includes everything and excludes nothing.

The lower court's "line-drawing" ignored two other crucial distinctions between this case and *Dobbert*. First, not only had Dobbert never been sentenced under the old law, but he *could not* have been sentenced under it, because it was unconstitutional. By contrast, Virginia's earlier law was plainly constitutional and had actually been applied to Evans' case as it progressed through every stage of the judicial system, from trial, through direct appeal, through certiorari, and through the state habeas system.

Finally, although the timing of events in Dobbert's case was completely fortuitous, here it was not. Whatever the state's motives in waiting twenty-three months before confessing error, two things are certain: the state knew that its own sentencing evidence was false from the moment that evidence was offered; and the state exercised exclusive control over when and how those errors would be disclosed. Under those circumstances, it is unconscionable to conclude that Patterson and Evans should be treated differently under the equal protection clause.[16]

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[16] The highest courts of at least two other states have held that the equal protection clause prohibits the sort of "line-drawing" that occurred here. *See Lee v. State*, 340 So. 2d 474 (Fla. 1976) (per

II. THE LOWER COURT'S REJECTION OF EVANS' DUE PROCESS CLAIM RESTS ON A FUNDAMENTAL MISCONCEPTION, WHICH THIS COURT SHOULD CORRECT, ABOUT THE LEVEL OF SCRUTINY REQUIRED IN FEDERAL HABEAS CORPUS REVIEW.

As this Court has observed, for more than a century federal habeas corpus review "has been a source of friction between state and federal courts . . . ." [17] In recent years, the Court has repeatedly revisited the thorny issues of federalism raised by the federal habeas statute, which requires the courts of one sovereign to review the decisions of another. The Court has on occasion found it necessary to admonish the lower federal courts against substituting their own view of the merits for that of the state judge who heard the evidence and saw the witnesses firsthand.[18]

That salutary principle has been utterly misunderstood and misapplied in this case. Here, the lower federal courts did more than defer to the state factfinder: they abdicated their statutory responsibility to provide *any* meaningful review of the state court's decision. This case vividly illustrates that the lower courts still do not know how to strike the appropriate balance between deference to state factfinding and the federal mandate to

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curiam) (no legitimate state objective advanced by sentencing to death one defendant who exercised his appellate rights while permitting all other similarly situated defendants to live). *Commonwealth v. Story*, 440 A.2d 488, 491-92 (Pa. 1981) (same). *See also Commonwealth v. Crenshaw*, 470 A.2d 451, 454-55 (Pa. 1983) (death sentence vacated where, but for extraordinary delay of almost three years in bringing defendant to trial, defendant would have been tried under old law and received life sentence). Those decisions were discussed extensively in the briefs below, but are unmentioned in the lower court's opinion.

[17] *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (*"Sumner I"*).

[18] *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 432-34 (1983); *Sumner v. Mata*, 455 U.S. 591, 596-98 (1982) (per curiam) (*"Sumner II"*); *Sumner I*, 449 U.S. at 446-51.

review. This Court should grant certiorari both to provide further guidance on that important issue and to correct a result that is demonstrably unjust.

The lower court is plainly and completely wrong in asserting—without citing a shred of the record evidence—that "the state habeas courts found the Commonwealth acted in good faith." (App. 12a (n.1); *see also* App. 10a). Equally groundless, and even more inexplicable, is the suggestion that there are findings of fact concerning the "'credibility of witnesses whose demeanor has been observed by the state trial court . . . .'"[19] In truth, the state habeas judge who heard two Commonwealth prosecutors admit under oath to the knowing use of false evidence in a capital case, and other actions that effectively concealed that wrongdoing for two years, made no findings of fact at all. Rather, his entire explanation for rejecting Evans' due process claim is confined to two sentences of an order drafted by the Commonwealth:

> [Evans] failed to prove by a preponderance of the evidence that the prosecution engaged in such misconduct or tactics of a nature which should preclude the Commonwealth from again seeking the death penalty in this case;
>
> and . . . .
>
> [T]he evidence fails to prove by a preponderance of the evidence that the Commonwealth purposefully and wrongfully delayed resolution of [Evans'] petition for a writ of habeas corpus in order to achieve a tactical advantage as alleged by the defendant . . . . (App. 118a-119a).[20]

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[19] (App. 11a) (quoting *Marshall v. Lonberger*, 459 U.S. at 434).

[20] That order was based on the court's oral ruling from the bench, made immediately at the close of the evidence and without benefit of post-trial briefs. (App. 117a).

To be sure, the Virginia Supreme Court provided some of the missing analysis in *Evans II*. But that opinion was based on a cold review of the written record and is no substitute for the fact-finding that should have been made by the judge who heard the live testimony of the witnesses. *But cf. Sumner I*, 449 U.S. at 541-

However "elusive" the distinction may sometimes be between findings of fact and legal conclusions,[21] the state court order at issue here is at the far end of the spectrum. It bears no resemblance to the findings of " 'basic, primary, or historical facts' " to which the presumption of correctness was intended to apply.[22] It tells nothing whatsoever about the court's view of what happened, when, or under what circumstances; which witnesses were credible, and which were not; what other evidence was probative, and what was not; and what other factors or events were considered and why. Indeed, the order sheds no light even on the *legal* standards that the court applied in reaching the result. On its face the order is nothing more than a cryptic summary ruling, which is certainly not a finding of fact, and may not even be a conclusion of law. The lower court's deference to this supposed "finding" fundamentally misconceives the mandate of federal courts in habeas review.[23]

42, 546-47 (presumption of correctness applies to state appellate court findings where issue was never presented to trial judge and thus, the *only* state findings were necessarily made by appellate court). In any event, far from finding good faith, the Virginia Supreme Court castigated the prosecutor for the "indifferent, careless manner" in which he had handled the evidence, and particularly, for proffering evidence that he knew was false. *Evans II*, 323 So. 2d at 120.

[21] *See Miller v. Fenton*, 474 U.S. 104, 113 (1985).

[22] *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980) (citations omitted). *See also Sumner II*, 455 U.S. at 597.

[23] Citing *Marshall v. Lonberger*, 459 U.S. at 433-34, the Commonwealth argued below that the state habeas judge's order rejecting Evans' due process claim was an "implicit" finding that the Commonwealth had acted in good faith. There is nothing in the opinion below to suggest that the circuit court accepted that argument, which in any event, is mistaken. In *Marshall* the issue resolved by the state trial court was a simple, narrow question of fact that turned entirely on whether the court believed, or disbelieved, the defendant's story; thus, the trial court's rejection of the defendant's claim necessarily implied a finding against the defendant's credibility. Here the factual record is complex, and

Even if this record did include some "findings of fact," the lower court completely failed to exercise its statutory responsibility to determine whether they were "fairly support[ed]" by the record "considered as a whole." 28 U.S.C. § 2254(d) (1982). The circuit court's examination of the record begins and ends with the prosecutors' self-serving declarations that they acted in good faith. Whether sincere or not, those statements are irrelevant to the issues presented.[24] What the circuit court failed to consider, or even mention, is the *conduct* that the prosecutors admitted occurred. Thus, prosecutor Kloch acknowledged that he knew the conviction records were false two months before trial; that he knowingly proffered them into evidence without mentioning their flaws to judge or jury; and that when he learned in December 1981 that the Virginia Supreme Court had explicitly relied on the false evidence, he did nothing to correct the court's unwitting error. (App. 92a-100a).

Likewise, the undisputed record evidence is that by January 1983—two months before the new sentencing law came into effect—Assistant Attorney General Slonaker had proof positive that Evans' claims of error in the state habeas petitions were accurate. Slonaker and Kloch both testified without contradiction that by January 1983 Kloch had told Slonaker in a face-to-face meeting that he knew prior to the trial that several of the seven convictions were duplicative, and that another was non-existent.[25] Moreover, the undisputed evidence established that by January 24, 1983, Slonaker had received written confirmation directly from the clerk of the court

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the state trial judge gave no clue about his reasons for rejecting Evans' claims.

[24] *Cf. Arizona v. Youngblood*, 109 S. Ct. 333, 337 (1988) ("[T]he good or bad faith of the State [is] irrelevant when the State fails to disclose to the defendant material exculpatory evidence.").

[25] *See* note 6, *supra*. At that meeting the two men even discussed whether it would be "easier" to seek resentencing of Evans if the capital sentencing amendment then pending in the Virginia legislature were adopted. (App. 99a).

in North Carolina that each of Evans' assertions was accurate. (App. 77a-82a). Whatever Slonaker's subjective estimate of his own good intentions, one thing is certain: he was obligated promptly to disclose the known errors and to correct the state's July 1982 Answer, which was materially inaccurate. What Slonaker did instead was to perpetuate the wrongdoing by filing, two months later (on March 3, 1983), an Amended Answer that continued to deny the factual allegations in Evans' petition. (App. 83a-86a).

Finally, the lower court erred in concluding that the "traditional remedy" of capital resentencing removed the prejudice Evans had suffered from the Commonwealth's two-year delay in confessing error. The plain fact is that if the Commonwealth had disclosed the known errors and misconduct at any time prior to March 1983, as it was obligated to do, Evans would not now be facing death. Thus, in the circumstances of this case, resentencing could not remove the prejudice, *because resentencing itself was the prejudice.* But for the Commonwealth's two-year delay in disclosing the truth, there would have been no resentencing, and hence, no death sentence. Under these circumstances, Evans was entitled to a more "drastic remedy" than resentencing.[26] His sentence should be commuted to life imprisonment, as the earlier law required.

III. THE DECISION BELOW EVISCERATES THE IMPORTANT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

In *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), this Court held that "the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant effective assistance of counsel on [his] appeal." Since *Evitts* the

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[26] *See United States v. Morrison*, 449 U.S. 361, 365-66 & n.2 (1981) ("drastic remedy" appropriate where there is "continuing prejudice which . . . could not be remedied by a new trial," or where there has been a "pattern of recurring violations" or "lawlessness" by the state).

Court has made plain that claims of ineffective assistance of counsel on appeal should be judged by the criteria set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and has recognized that this right "may in a particular case, be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial."[27] The circuit court recognized these standards in principle, but not in practice. (*See* App. 14a-15a). This Court should grant certiorari to provide needed guidance concerning the proper application of this important constitutional right.

The circuit court's recitation of the record evidence concerning Evans' appeal ignores the single most striking fact, which is uncontested: although defense counsel represented Evans continuously from the moment of his arrest (January 1981) through the denial of certiorari on his direct appeal (March 1982), counsel somehow failed to do the cardinal task of any lawyer representing the defendant in a capital sentencing—they failed accurately to determine their client's prior conviction record. That failure is particularly egregious in light of the Virginia capital sentencing statute's prominent emphasis on the prior conviction record of the accused,[28] counsel's lengthy representation of Evans, the ease with which the prosecution accurately determined the same information,[29]

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[27] *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (citations omitted).

[28] Virginia's sentencing statute explicitly identifies "the past criminal record of convictions of the defendant" as the principal factor to be considered by the capital sentencing jury. Va. Code § 19.2-264.2(1) (1983).

[29] It is undisputed that two months before trial, a junior lawyer from the prosecutor's office correctly discovered Evans' true record after a brief trip to North Carolina. (*See* App. 29a-30a). Evans' habeas counsel, Mr. Shapiro, discovered the same information almost immediately after beginning the representation and without leaving Virginia.

and Evans' own efforts to alert counsel to the errors in the Commonwealth's Exhibits.[30]

The circuit court's rejection of Evans' claim rests on three crucial errors. First, the court errs in suggesting that because counsel traveled to North Carolina to investigate Evans' prior conviction record, "counsel's performance was reasonable." (App. 14a). Under *Strickland* counsel must do more than perform; they must perform *effectively*. In a capital case, counsel's utter failure to ascertain their client's conviction record cannot possibly be deemed "effective" assistance.

Second, the lower court inexplicably errs in asserting that "[t]he errors in the certified conviction records introduced at trial could only be shown by going outside the trial record." (App. 15a). That conclusion is flatly at odds with the court's own statements, in an earlier portion of the opinion, that defense counsel "had been given pretrial access to the discovery materials which showed the conviction records were questionable," and that "during the sentencing proceeding, the prosecutor advised defense counsel of the discrepancies regarding the convictions . . . ." (App. 10a-11a).[31]

More importantly, the Commonwealth's post-sentence report, dated May 12, 1981, unmistakably stated that the most serious of the supposed "convictions" presented at trial—"Assault on Officer/Affray with a Deadly Weapon"—had been *nolle prossed*. (App. 43a). Without

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[30] The record includes a handwritten letter from Evans to his lawyer, dated March 2, 1982, stating in part: "I never assaulted a police officer. If you still think I did? please send me his name." [*sic*]

[31] If the prosecutor's highly improbable testimony on this matter (which defense counsel contradicted under oath) is to be credited as a basis for rejecting Evans' due process claim (*see* App. 10a-11a), it also establishes that defense counsel utterly failed to protect Evans' interest by failing to challenge the errors on appeal.

question that report was part of the trial record.[32] If Evans' counsel had read the report, as counsel claimed to have done (*see* App. 47a), he should have known—without investigating any matters "outside the record"—that Evans' death sentence was invalid.[33]

Moreover, contrary to the lower court's assertion (App. 15a), Evans suffered drastic prejudice from his counsel's errors. The plain fact is that if Evans' counsel had discovered the essential facts about their client's prior record at any time during the year-long appeal, Evans' sentence would have been voided, the Commonwealth would have been "foreclosed from seeking capital resentencing," and Evans would have "received an automatic sentence of life imprisonment." (*See* App. 5a).

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN STATE AND FEDERAL COURTS OVER WHETHER DUE PROCESS REQUIRES A CAPITAL SENTENCING JURY TO BE TOLD, IN RESPONSE TO THEIR SPECIFIC QUESTION, THAT A SPLIT DECISION WILL AUTOMATICALLY RESULT IN A SENTENCE OF LIFE IMPRISONMENT.

Even if Virginia's amended sentencing statute could be applied to Evans, his 1984 resentencing proceeding was fatally flawed by the trial court's erroneous instruction, in response to a specific jury question, about the effect of a split decision. The court's instruction substantially increased the likelihood of a death sen-

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[32] *See* App. 49a ("The report of the probation officer is hereby filed as part of the record of this case.").

[33] At the September 21, 1983 hearing, counsel acknowledged that the portion of the post-sentence report indicating that the charge of assaulting a police officer had been nollied "should have" raised, but did not "raise a red flag to me." He stated: "I should have been more diligent. I should have read everything I got in the discovery, but I didn't, plain and simple." (App. 109a).

tence because it erroneously suggested that each juror had far less power to influence the outcome than was actually the case. The Fourth Circuit's opinion rejecting Evans' challenge to the jury instruction is a novel ruling that squarely conflicts with the decisions of the highest courts of two other states.[34] This Court should grant certiorari to resolve the conflict on this crucial issue.

Though scarcely mentioned in the opinion below, the relevant facts are neither complex nor contested. In the middle of its deliberations in the 1984 resentencing proceeding, the jury asked:

> The decision must be unanimous for death, must the decision also be unanimous for life, or *does a split decision automatically become life*?

(App. 122a) (emphasis added). Defense counsel then requested a response, based on the language of Virginia Code § 19.2-264.4(E), which would inform the jury that "if they cannot be unanimous on death, then it is life." (App. 122a). The court rejected that request, explaining:

> I will tell you what the flaw in that is, Mr. Howard [defense counsel], that encourages a single person

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[34] *See State v. Loyd*, 459 So. 2d 498, 502-03 (La. 1984); *id.* at 509 (separate opinions of Dennis, J., and Lemmon, J., concurring); *State v. Williams*, 392 So. 2d 619 (La. 1980). *See also State v. Ramseur*, 524 A.2d 188, 282-86 (N.J. 1987) (in a capital case, due process requires judge to inform jury about the effect of a split decision even if jury has not asked). The Fourth Circuit's decision also conflicts with the reasoning, if not express holding, of a decision of a panel of the United States Court of Appeals for the Eighth Circuit in a non-capital case. *See United States v. Arpan*, 861 F.2d 1073 (8th Cir. 1988), *vacated for rehearing en banc*, 867 F.2d 1188 (8th Cir. 1989). Although the panel decision in *Arpan* is now under review, its existence underscores that the lower courts are divided on how to answer jury questions concerning the effect of a split decision.

> to hold out, *and tells a single person that they have the ability to dictate the outcome.*

(App. 122a) (emphasis added).

The trial judge then answered the jury's question as follows: "You are instructed that your verdict must be unanimous as to either life imprisonment or death." (App. 123a). Although that response was technically accurate—a "verdict" by definition is a unanimous decision—it was both unresponsive and misleading. The jury had asked what would happen if it *failed* to reach unanimous agreement. The answer to that question could not be clearer: under Virginia law a split decision by a capital sentencing jury *does* "automatically become life." [35] The trial court's response to the jury's specific request for guidance not only withheld important information about the true state of Virginia law, but also could not have failed to leave the misleading and inaccurate impression that Evans would not receive a life sentence unless the jury's verdict was unanimous. This violated due process.

The circuit court's rejection of Evans' claim simply sidesteps the issue. In paraphrasing the jury's question, the court subtly distorts its meaning and misses its essential thrust. The jury did not simply inquire "whether a life sentence must be unanimous" (App. 13a); rather, in the heat of its deliberations it asked the trial judge

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[35] The Virginia Code explicitly provides that if a capital sentencing jury cannot reach a unanimous verdict, "the court *shall* dismiss the jury, and *impose a sentence of imprisonment for life.*" Va. Code § 19.2-264.4(E) (1983) (emphasis added). *See, e.g., Virginia Dept. of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399, 406 n.3 (1984) ("a single juror can prevent imposition of the death penalty"); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 791 (1979), *cert. denied*, 444 U.S. 1049 (1980) ("[A] disagreement by one or more of the jurors as to the proper sentence would, by statute, result in life imprisonment.").

"does a split decision automatically become life?" That is a different question, and it demanded a candid response.[36]

The precise federal question presented here was exhaustively addressed in two decisions of the Louisiana Supreme Court that directly contradict the Fourth Circuit's reasoning and result. In those cases, the court held that federal due process is violated by an instruction that leaves the individual jurors "free to speculate as to what the outcome would be in the event there was not unanimity" and creates the "false impression" that "a new trial, before another jury would be required."[37] Such errors are highly prejudicial because "[i]f only one of the twelve jurors was swayed by the failure to inform him fully of the consequences of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed."[38]

The Louisiana decisions correctly apply principles of this Court articulated in other contexts. Thus, in *Cald-*

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[36] The due process issue presented here is not even addressed, let alone resolved, by the decision in *Barfield v. Harris*, 540 F. Supp. 451, 472 (E.D.N.C. 1982), *aff'd*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), cited and relied upon by the court below. In *Barfield* the petitioner challenged the effectiveness of her trial counsel because he had *not requested* an instruction concerning the effect of a split decision in the penalty phase of her capital trial. *See* 540 F. Supp. at 461. The court held that petitioner was not denied due process either by counsel's failure to make the request, *id.* at 461-62, or by the trial judge's failure to give such an instruction on his own initiative, *id.* at 472. Unlike here, there was no defense request for an instruction on unanimity, no jury question at all, and no misleading response from the court.

[37] *State v. Williams*, 392 So. 2d at 631. *See also State v. Loyd*, 459 So. 2d 498 (La. 1984).

[38] *State v. Williams*, 392 So. 2d at 631. *See also State v. Loyd*, 459 So. 2d at 503 (capital sentencing presents a "unique" situation in which "a single juror, by persisting in a sentencing recommendation at variance with all of his fellow jurors, may alone cause imposition of a life sentence.").

well v. Mississippi, 472 U.S. 320 (1985), the Court voided a death sentence because the prosecutor's summation had created an "intolerable danger" that the jurors would underestimate the importance of their role in the sentencing process. *Id.* at 333. More recently, the Court ordered resentencing because an "ambiguity" in the state verdict form made it possible that the jurors "misunderst[oo]d the previous instructions as to unanimity. . . ." *Mills v. Maryland*, 108 S. Ct. 1860, 1869-70 (1988). The danger here was far greater than in either *Caldwell* or *Mills*. Each individual juror in the Evans case was in effect told—by the trial court, not the prosecutor [39]—that without the unanimous concurrence of his eleven peers, he was powerless to effect a life sentence, when in fact the precise opposite was true.

This Court has already imposed a "high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills*, 108 S. Ct. at 1870. Because the Fourth Circuit's decision endorses a sentencing instruction that falls far short of that standard, and conflicts with the express decisions in two other jurisdictions, this Court should grant certiorari to resolve the issue.[40]

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[39] *Cf. Darden v. Wainwright*, 477 U.S. 168, 183-84 n.15 (1986) (erroneous statements to the jury are more serious when they are approved by the judge).

[40] The question whether Evans is entitled to another resentencing takes on additional importance in light of the events that occurred after his 1984 sentencing. *See* note 7, *supra*. The jury that sentenced Evans to death did not know and could not have known that five months later Evans would risk his life to save the guards held hostage in the 1984 uprising at Mecklenburg prison. In any resentencing that evidence will be highly probative of whether there is still a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society. . . ." Va. Code § 19.2-264.2(1) (1983).

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment XIV, § 1 provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code § 19.2-264.2 provides:

> § 19.2-264.2. *Conditions for imposition of death sentence.*
>
> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .

Virginia Code § 19.2-264.3 provides:

> § 19.2-264.3. *Procedure for trial by jury.*
>
> A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence . . . .
>
> C. If the jury finds the defendant guilty of an offense which may be punishable by death, then

a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . . .

[If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.] [Bracketed portion added by amendment of March 28, 1983].

Virginia Code § 19.2-264.4 provides:

§ 19.2-264.4. *Sentence proceeding*—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life. . . .

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.